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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF SOUTH CAROLINA,

Petitioner,

versus

WARREN DOUGLAS MANNING,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES THE FEDERAL CONSTITUTION PROHIBIT DEFINING REASONABLE DOUBT TO A JURY?

II.

DOES THE SOUTH CAROLINA SUPREME COURT'S OPINION CONFLICT WITH THE COURT'S OPINION IN GASKINS V. MCKELLAR, ___ U.S. ___, 111 S.CT. 2277 (1991) AND THE DECISIONS OF OTHER CIRCUIT AND STATE COURTS APPROVING OF SIMILAR DEFINITIONS OF REASONABLE DOUBT?

III.

DID THE SOUTH CAROLINA SUPREME COURT FAIL TO ANALYZE THE REASONABLE DOUBT INSTRUCTION ACCORDING TO THE CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) ANALYSIS?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

I. The South Carolina Supreme Court's reliance ion the Court's ruling in Cage v. Louisiana, ___ U.S. ___, 111 S. Ct. 328 (1990), is erroneous and conflicts with other jurisdictions. 11

II. The South Carolina Supreme Court failed to analyze the reasonable doubt instruction according to the Chapman v. California, 386 U.S. 18 (1967), harmless error analysis . 33

CONCLUSION 34

APPENDIX A
Opinion of the Supreme Court of South Carolina. 35

APPENDIX B
Trial Court's Guilt Phase Instructions 46

AFFIDAVIT OF FILING. 68

AFFIDAVIT OF SERVICE 69

TABLE OF AUTHORITIES

CASES:

Adams v. State, 587 So.2d 1265 (Ala. Crim. App. 1991) 25

Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190 (1990) 11

Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990) . . . 9, 11, 16, 20-23, 27, 28, 31, 33

Chapman v. California, 386 U.S. 18 (1967). 33

Cupp v. Naughten, 414 U.S. 141 (1973) 11, 21

Dunn v. Perrin, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978) 14

Francis v. Franklin, 471 U.S. 307 (1985). 13

Gaskins v. McKellar, ___ U.S. ___, 111 S.Ct. 2277 (1991) 23

Holland v. United States, 348 U.S. 121 (1954) 10, 15

Idaho v. Rhoades, Nos. 17437, 18039, ___ P.2d ___ (Idaho Feb. 13, 1991) (WESTLAW No. 15607) 24

In re Winship, 397 U.S. 358 (1970). 13, 18, 21

Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991) 30

Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) 14

Murphy v. Holland, 776 F.2d 470 (4th Cir. 1985), vacated on other grounds, 475 U.S. 1138 (1986). 14

People v. Jennings, 53 Cal.3d 334, 807 P.2d 1009, cert. denied, No. 91-5569 (U.S. Nov. 18, 1991) (WESTLAW No. 178975) (1991) . 30, 32

Robinson v. Callihan, 694 F.2d 6 (1st Cir. 1982) 29

Rose v. Clark, 478 U.S. 577 (1986) . . 33

Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), cert. denied, 466 U.S. 976 (1984) 15, 28

State v. Cage, 554 So.2d 39 (La. 1989) 16-18

State v. Cage, 583 So.2d 1125 (La.), cert. denied, ___ U.S. ___, 112 S.Ct. 211 (1991) 33

State v. Haston, 811 P.2d 929 (Utah 1991) 31

State v. Jones, 582 So.2d 973 (La.App. 1991) 30

State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991) 24

State v. Richard Charles Johnson, Op. No. 23489 (S.C. Sup. Ct. filed October 7, 1991) 23

State v. Turner, 810 S.W.2d 92 (Mo.App. 1991) 30

State v. Warren Douglas Manning, Op. No. 23470 (S.C. Sup. Ct. filed September 9, 1991) . . 1, 9, 26

Taylor v. Kentucky, 436 U.S. 478 (1978) 14

United States v. Byrd, 352 F.2d 570, 575 (2nd Cir. 1965) 14

United States v. Christy, 444 F.2d 448 (6th Cir.), cert. denied, 404 U.S. 949 (1971) 15

United States v. Davis, 328 F.2d 864 (2nd Cir. 1964) 29

United States v. Drake, 673 F.2d 15 (1st Cir. 1982) 27

United States v. Hasting, 461 U.S. 499 (1983) 33

United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975) 14

United States v. Love, 767 F.2d 1052 (4th Cir.), cert. denied, 474 U.S. 1081 (1985) 26

United States v. Magnano, 543 F.2d 431 (2nd Cir. 1976), cert. denied, 429 U.S. 109 (1977) 26

United States v. Martin-Trigona, 684 F.2d 485 (7th Cir. 1982) . . . 14

United States v. Moss, 756 F.2d 329 (4th Cir. 1985) 14

United States v. Olmstead, 832 F.2d 642 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988) 14

United States v. Smith, 468 F.2d 381
(3rd Cir. 1972) 15

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The Attorney General of South Carolina on behalf of the State of South Carolina petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of South Carolina that reversed and remanded a capital case for a new trial.

OPINION BELOW

The Opinion of the South Carolina Supreme Court reversing and remanding for a new trial was filed on September 9, 1991. The case is reported as State v. Warren

Douglas Manning, Op. No. 23470 (S.C. Sup. Ct. filed September 9, 1991), and is appended hereto as Appendix A at page 35. Petition for Rehearing was denied on October 8, 1991. Judgment was entered and the Remittitur sent to the Court of General Sessions of Dillon County, South Carolina, on November 1, 1991.

JURISDICTION

The Petition for Certiorari is for review of the opinion of the South Carolina Supreme Court, which is the direct appeal of a criminal murder conviction filed on September 9, 1991. This Court has jurisdiction to review the opinion rendered below pursuant to 28 U.S.C. §1257(3) and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitutions, which provides: "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Warren Douglas Manning was indicted at the November 14, 1988, term of the Court of General Sessions for Dillon County, South Carolina, for the murder of South Carolina State Trooper George Radford. A change of venue was had to Kershaw County, South Carolina. Manning stood trial before a jury and the Honorable C. Anthony Harris, Presiding Judge, from April 10 - April 15, 1989. Manning was convicted of murder on April 14, 1989. On April 15, 1989, a penalty phase hearing was held before the same jury and judge. After hearing evidence in mitiga-

tion, the jury unanimously recommended that he be sentenced to death by electrocution, finding also the statutory aggravating circumstance of murder of a law enforcement officer during or because of the performance of his official duties. Judge Harris sentenced Manning to death in accordance with the jury's decision.

In his final guilt phase instructions to the jury, the trial judge, without objection by defense counsel, included the following:

> Madam Foreman, members of the jury panel, anybody who's charged with committing a crime in this State is presumed to be innocent and the presumption of innocence would obtain in favor of the Defendant throughout the trial. And when you go to your jury room you will commence deliberating from the viewpoint that the law presumes the Defendant innocent. I'm confident that when you go to the jury room you will commence your deliberations by giving the Defendant the benefit of the presumption of his innocence, which brings me to the next principle of law and that is that the Solicitor, who represents the people of this State in the prosecution of

alleged crimes, is required to prove to you the existence of every material element of any crime which he charges. In this case the charge is murder, so the solicitor is required to prove beyond a reasonable doubt the existence of each element of the crime of murder. And you, of course, commencing your deliberations from the standpoint that the law presumes the Defendant innocent, would hold the solicitor to the burden of proof. That's what we mean when we use the legal term, burden of proof. Somebody who says something about somebody else is required to prove it to the jury which is empaneled to hear the case.

I tell you, further, that the Solicitor is required, obviously, to prove the existence of the material elements of the charge by evidence presented here in this courtroom since the commencement of this trial.

Madam Foreman and members of the jury panel, murder in this State is the unlawful killing of another human being with malice aforethought. That is the legal definition of the crime of murder.

In order to convict one of murder the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought. And that proof must, of course, be beyond a reasonable doubt.

> When I use the term, beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and that is a doubt for which you can give a real reason. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. A reasonable doubt is a substantial doubt for which honest people, such as you, when searing for the truth can give a real reason. So it's to that degree of proof that the State is required to establish the elements of a charge.

(emphasis added). (App. pp. 52-55). Later, during the charge on circumstantial evidence, the trial judge explained:

> Members of the jury panel, the Defendant pleads alibi in this matter. That is, he says that I was not even present at the scene of the crime, therefore it could not have been me which committed it. I tell you that the Defendant is not assigned any burden of proof to establish his alibi. The burden remains on the solicitor to prove the crime and that the crime was committed by the Defendant so that the fact that the Defendant pleads, I was not there, does not give him the burden of proving that he was not there, it simply means that that's his explanation to you and that from start to

finish the solicitor is required to prove beyond a reasonable doubt that the Defendant committed the crime with which he's charged.

Madam Foreman, members of the jury panel, crime may be proved by circumstantial evidence as well as by direct evidence, provided it meets the legal test. By direct evidence of a fact we mean testimony of people who have perceived the existence of that fact by means of their own senses and then come into court and relay to a jury that I perceive that fact through my senses. The prototype of direct evidence is the eyewitness, that is someone who watches something happen and then tells the jury, this is what I saw. Other senses are hearing, feeling, smelling, et cetera. Those are senses of the human body, human being, with which we're all familiar. Anything perceived through those senses is direct evidence.

By indirect or circumstantial evidence we mean the proof of some other fact or facts from which, when taken even singularly or collectively, the existence of the particular fact in question is necessarily inferred as a consequence of the facts which have been proven.

As I tell you, circumstantial evidence is good provided it meets the legal test. To the extent that the State relies on circumstantial evidence to prove any aspect of its case, the State must

prove all the circumstances relied on and must prove them beyond a reasonable doubt, the definition of which I've already given you.

Those circumstances must be wholly and in every particular consistent with each other and they must point conclusively to the guilt of the accused to the exclusion of any other reasonable hypothesis.

That is, they must be absolutely inconsistent with any reasonable hypothesis other than the guilt of the accused.

When you are giving your attention to circumstantial evidence, I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such reasonable explanation can be found you would find the Defendant not guilty on the charge inasmuch as the Solicitor has relied on circumstantial evidence.

I tell you, further, that the mere fact that the circumstances are suspicious and the Defendant's guilt probable, would not be sufficient to sustain the conviction because the proof offered by the State must exclude any reasonable hypothesis except that of guilt and must satisfy you beyond a reasonable doubt.

Sometimes during a charge, and I might have used it, the phrase moral certainty might be used. <u>There is no different degree of</u>

> proof required. Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law. It might be a different way of stating the same proposition. Either of those two phrases, moral certainty, beyond a reasonable doubt, connote a degree of proof which is distinguished from an absolute certainty.

(emphasis added). (App. pp. 60-64).

In the appeal to the South Carolina Supreme Court, Manning's conviction for murder was reversed on the basis of the aforementioned guilt phase instructions of the trial judge which, taken as a whole, could have led a reasonable juror to allow a finding of guilt based upon a degree of proof below that required by the Due Process Clause. State v. Warren Douglas Manning, Op. No. 23470 (S.C. Sup. Ct. filed September 9, 1991). Relying on the Court's recent decision in Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990), the South Carolina Supreme Court stated the trial court's reference to "moral certainty" in defining "reasonable doubt"

> [was] misleading in that it allows a juror to base a finding of guilt upon a subjective feeling rather than upon an evaluation of the evidence. See United States v. Drake, 673 F.2d 15 (1st Cir. 1982). The use of a moral certainty standard rises to the level of a constitutional violation when it is combined with other terms in the judge's charge which "suggests a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Cage v. Louisiana, 111 S.Ct. at 329-30.

(App. pp. 41-42). Further, the South Carolina Supreme Court found that defining "reasonable doubt" as "a doubt for which you can give a real reason," when examined in context of the entire charge, further suggests a higher degree of doubt than that required for acquittal. (App. p. 43). It suggested that trial courts in South Carolina limit their definitions of "reasonable doubt" to that approved by the Court in Holland v. United States, 348 U.S. 121, 140 (1954):

> A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

(App. p. 44).

REASONS FOR GRANTING THE WRIT

I.

The South Carolina Supreme Court's reliance ion the Court's ruling in Cage v. Louisiana, U.S. , 111 S. Ct. 328 (1990), is erroneous and conflicts with other jurisdictions.

A single instruction cannot be artificially severed from the rest of the jury charge, since the effect of an assertively erroneous instruction can only be determined by scrutiny of the charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). Id. at 147. The question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous or even universally condemned." Id. In Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190 (1990), the Court concluded that where

an instruction is ambiguous and subject to an erroneous interpretation "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 110 S.Ct. at 1198. Of pertinent importance to the issue here, the Court stated:

> This 'reasonable likelihood' standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that

> has taken place at the trial likely to prevail over technical hairsplitting. [emphasis added].

Id. See Francis v. Franklin, 471 U.S. 307 (1985).

Numerous courts have discussed definitions of "reasonable doubt" and their impact upon a jury. They unanimously adhere to the requirement that a criminal charge must be proven beyond a reasonable doubt is for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. 358, 364 (1970). The reasonable doubt standard gives substance to the presumption of innocence and instills confidence in the community that the innocent will not be condemned. A defendant in a criminal case, therefore, has a constitutional right to have the jury instructed that guilt must be established beyond a reasonable doubt. Id.

The practice of defining "reasonable doubt" in a charge to the jury has been held not to be required in a criminal trial and has often been condemned. United States v. Moss, 756 F.2d 329 (4th Cir. 1985); United States v. Martin-Trigona, 684 F.2d 485 (7th Cir. 1982); Dunn v. Perrin, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910 (1978). Several circuits have held that the phrase is one of common usage and acceptance, requiring no definition beyond the language itself. See Monk v. Zelez, 901 F.2d 885, 889-890 (10th Cir. 1990); United States v. Olmstead, 832 F.2d 642 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988); Murphy v. Holland, 776 F.2d 470 (4th Cir. 1985), vacated on other grounds, 475 U.S. 1138 (1986); United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); United States v. Byrd, 352 F.2d 570, 575 (2nd Cir. 1965). See also Taylor v. Kentucky, 436 U.S. 478 (1978). The Court

has stated that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Holland v. United States, 348 U.S. 121, 140 (1954). Conversely, mere attempts to define "reasonable doubt" have been held not to constitute reversible error per se. Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), cert. denied, 466 U.S. 976 (1984); United States v. Smith, 468 F.2d 381 (3rd Cir. 1972); United States v. Christy, 444 F.2d 448 (6th Cir.), cert. denied, 404 U.S. 949 (1971). The Holland court suggests that an acceptable definition would define "reasonable doubt" as "the kind of doubt that would make a person hesitate to act." Holland v. United States, 348 U.S. at 140. The challenge confronting a court that would define "reasonable doubt" is to avoid language that may "mislead the jury into finding no reasonable doubt when in fact there was some." Id.

With these concepts in mind, we turn to a comparison of the Cage instruction with the instructions in this case. In Cage, the Court was presented with a certiorari petition from a direct appeal from a death penalty conviction in Louisiana, State v. Cage, 554 So.2d 39 (La. 1989). In that appeal, the Supreme Court of Louisiana specifically addressed the issue of whether it was error for the trial court in its charge on "reasonable doubt" to instruct that doubt "must be such ... as would give rise to a grave uncertainty" and that "it is a doubt which a reasonable man can entertain. What is required is not an absolute or mathematical certainty, but a moral certainty." Id. at 41.[1] Relying on its

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[1] The relevant portion of the instruction in Cage is set forth as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not

prior decisions, the Supreme Court of Louisiana concluded that the use of "grave uncertainty" and "moral certainty," if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury. However, when reviewing the charge as a whole, the Supreme Court of Louisiana concluded that reasonable jurors

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> guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty. [emphasis added].

State v. Cage, 554 So.2d at 41.

would understand the definition of "reasonable doubt." Id.

The Court, in a per curiam Order granting the petition for certiorari, reversed the judgment of the Supreme Court of Louisiana and remanded the matter for further proceedings not inconsistent with the opinion. The Court concluded that the instruction at issue was contrary to the "beyond a reasonable doubt" requirement articulated in In re Winship, supra. The Court, emphasizing that the standard of review is still "how reasonable jurors could have understood the charge as a whole," concluded that the jury charge given allowed a reasonable juror to find guilt based upon a degree of proof below that required by the Due Process Clause. The Court stated that:

> The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated what was required with a "moral certainty" that the de-

> fendant was guilty. It is plain to us that the words "substantial" and "grave" as they are commonly understood, suggest a higher degree of doubt than that required for acquittal under a reasonable doubt standard. When those statements are then considered in reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id., 111 S.Ct. at 329-330.

The South Carolina Supreme Court found that the questioned instructions here were strikingly similar to the Cage instruction, and thus held that the instructions were deemed unconstitutional and Manning's conviction was accordingly reversed. When comparing the challenged instruction to the Cage instruction, there are some similarities and striking differences.

The trial judge's use of the term "moral certainty" in context of the instruction regarding circumstantial evidence was not per se error as found by the South

Carolina Supreme Court. In Cage, the Court stated that the words "substantial" and "grave", coupled with "moral certainty" rather than evidentiary uncertainty could have caused a reasonable juror to make a finding of guilt based on a degree of proof below that required. Id., 111 S.Ct. at 329-330. After reviewing the instruction as a whole, the Court struck it down based on the combination of the three (3) terms since those phrases lacked the common sense understanding of "reasonable doubt" in the context in which they were given. In the present case, the concept of reasonable doubt was directly related to the evidence or lack thereof -- the charge did not define "reasonable doubt" as such as would give rise to a "grave uncertainty" as was condemned in Cage. The phrases "moral certainty" and "beyond a reasonable doubt" were contrasted with the term "absolute certainty." The phrases "actual substantial doubt"

and "grave uncertainty", which were in Cage, are clearly not present in the instructions here. The instructions were a much less restrictive definition of "reasonable doubt" by not using the phrase "grave uncertainty" to quantify the reasonable doubt required for an acquittal. As such, the challenged instructions did not lessen the State's burden of proof.

When viewing the instructions as a whole,[2] Cupp v. Naughten, supra, the jury's overall concept of reasonable doubt was not destroyed. The instructions properly advised the jury and "protect[ed] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he [stood] charged." In re Winship, 397 U.S. at 364. The trial judge fully informed the jury of Manning's presumption of innocence, and that

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[2] The entire guilt phase instructions appear in the Appendix at pp. 46-67.

the perception of innocence alone was sufficient to acquit Manning unless the State adduced evidence of his guilt "beyond a reasonable doubt." The instructions here are much less restrictive than those condemned in Cage and, taken as a whole, correctly conveyed the concept of "reasonable doubt."

Moreover, while a reasonable reading of the Cage instruction leads to the conclusion that an accused is to be convicted unless such doubt rises to the level of a "moral certainty," the questioned instructions permit conviction only on the lack of such doubt as established to a "moral certainty." In other words, under the Cage instruction a juror is to vote for conviction unless convinced to a "moral certainty" that there exists a reasonable doubt, whereas under the questioned instructions a juror is to vote for acquittal unless convinced to a "moral certainty" that no reasonable doubt exists.

Those are two (2) very different instructions, indeed; one contradicts the other.

We would note that in denying a petition for writ of certiorari from another South Carolina capital case, which contained similar guilt phase instructions, Justice Stevens, speaking for the Court, held the issue whether the decision in Cage announced a new rule was not presented "[b]ecause the instructions to the jury in [that] case did not contain the improper language, [i.e., that a reasonable doubt 'must be a doubt as would give rise to a grave uncertainty']." Gaskins v. McKellar, ___ U.S. ___, 111 S.Ct. 2277, 2277 (1991). Similarly, in its recent opinion in State v. Richard Charles Johnson, Op. No. 23489 (S.C. Sup. Ct. filed October 7, 1991), the South Carolina Supreme Court upheld an almost identical reasonable doubt instruction by the trial court. Id., Slip Op. at 30-32. A number of courts likewise have upheld instructions defining "reason-

able doubt" in terms of a "moral certainty" and distinguished the instructions challenged before them from the Cage instructions on a variety of grounds. In State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), the Supreme Court of Nebraska upheld a charge wherein the jury was instructed, inter alia, that reasonable doubt "is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required." In upholding this instruction, the court held that the instruction permitted conviction only if the lack of such doubt is established to moral certainty and not to convict unless convinced to a moral certainty there exists a reasonable doubt. Accord Idaho v. Rhoades, Nos. 17437, 18039, ___ P.2d ___ (Idaho Feb. 13, 1991) (WESTLAW No. 15607)

(McDevitt, J., on rehearing) (reasonable doubt "is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. A reasonable doubt is an actual doubt based upon the evidence or lack of evidence. It is such doubt as you are conscious of after going over in your minds the entire case and giving consideration to all the testimony"); Adams v. State, 587 So.2d 1265 (Ala. Crim. App. 1991) (convict if convinced beyond a reasonable doubt and to moral certainty of guilt; defines reasonable doubt as not capricious, fanciful, vague, or imaginary, but as actual and substantial doubt arising

from consideration of evidence or lack of it). Cf. United States v. Love, 767 F.2d 1052 (4th Cir.), cert. denied, 474 U.S. 1081 (1985) (charge that a reasonable doubt "exists in any case when after a careful and impartial consideration of all the evidence, you the jury does not feel convinced to a reasonable moral certainty that a Defendant is guilty of the charges" not reversible error per se in view of charge as a whole); United States v. Magnano, 543 F.2d 431 (2nd Cir. 1976), cert. denied, 429 U.S. 109 (1977) (that reasonable doubt is "an abiding conviction of his guilt which amounts to a moral certainty -- I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives" not reversible error per se). Some courts, as the South Carolina Supreme Court in State v. Manning, supra, have stated disapproval for the "moral certainty"

language on the grounds jurors might feel justified in convicting based on a feeling rather than the facts of the case. See United States v. Drake, 673 F.2d 15 (1st Cir. 1982). But, what the South Carolina Supreme Court failed to evaluate was the ameliorating effect of the entire guilt phase instructions.

Further, the Court did not find error in contrasting reasonable doubt as "a doubt for which you can give a real reason" for the most reasonable interpretation -- and that most likely followed by the jury here -- did not contain the vice found by the Court in Cage. The charge as a whole merely stressed to the jury that they were the ultimate fact-finders and they needed to "make an honest, conscientious effort to resolve the factual dispute." (App. p. 66). The jury's burden on doubt was directed to doubt arising from the testimony or evidence or from the lack of testimony or evidence,

which was the evidentiary certainty absent in Cage.

The Fourth Circuit Court of Appeals in Smith v. Bordenkircher, supra, found that an instruction defining reasonable doubt as "one for which he who entertains such doubts should be able to give a good and substantial reason" did not impermissibly lower the State's burden of proof or otherwise place upon the defendant the burden of providing the jury with an articulable basis on which to acquit him of the offense charged. Id., 718 F.2d at 1277-1278. The court acknowledged the instruction probably was an imprudent effort by the trial court to explain to the jury in more concrete terms the meaning of the concept of reasonable doubt. When considered in context of the entire charge, it did no more than suggest to the jury the need to have a doubt that could, if necessary, be held conscientiously in the fact of opposition from fellow jurors, particularly

where, as in the present case, the jury was instructed that "when you go to your jury room, you make an honest, conscientious effort to resolve the facial dispute, as I'm confident you will do." (App. p. 66). The Fourth Circuit Court of Appeals stated it did not approve of the challenged instruction but, in context of the entire charge, it did not so affect the trial that the resulting conviction violated due process. Other courts have found such language not to constitute reversible error. Robinson v. Callihan, 694 F.2d 6 (1st Cir. 1982) ("a doubt for which you can give a reason"); United States v. Davis, 328 F.2d 864 (2nd Cir. 1964) (a doubt for which, when asked by a fellow juror, "you can give a reason"). As in Bordenkircher, and not included in Cage, the trial judge gave an ameliorating instruction that "the mere fact that the circumstances are suspicious and [Manning's] guilt probable, would not be sufficient to

sustain the conviction because the proof offered by the State must exclude any reasonable hypothesis except that of guilt and must satisfy you beyond a reasonable doubt." (Tr. p. 1086, lines 19-24). This instruction is consistent with a reasonable juror's concept of "reasonable doubt" and, neutralizes any negative effects of the challenged instructions. People v. Jennings, 53 Cal.3d 334, 807 P.2d 1009, cert. denied, No. 91-5569 (U.S. Nov. 18, 1991) (WESTLAW No. 178975) (1991) (acquit if juror lacks abiding conviction of truth of charge); State v. Jones, 582 So.2d 973 (La.App. 1991) (convict if convinced beyond a reasonable doubt, such being not a possible doubt, but an actual or substantial one such as reasonable person would seriously entertain, a serious doubt for which juror could give good reason); State v. Turner, 810 S.W.2d 92, 94 (Mo.App. 1991) (convict if "'firmly convinced of the defendant's guilt'"); Lord v. State, 107

Nev. 28, 806 P.2d 548 (1991) (convict if exists an abiding conviction of truth of charge, for there is then not a reasonable doubt, such a doubt being not a mere possible doubt, but one based on reason, one as would govern or control in more weighty affairs of life). See also State v. Haston, 811 P.2d 929 (Utah 1991).

Thus, unlike Cage, there was no transformation of true reasonable doubt, as it has been traditionally defined, into a higher degree of doubt. The plain meaning of the questioned instructions merely inform the jury to reject unreasonable interpretations of the evidence and to give Manning the benefit of any reasonable doubt. It is our position that viewing the questioned instruction as a whole, reasonable jurors of ordinary intelligence were able to understand the definition of "reasonable doubt." Its focus is upon the evidential aspects requisite in the weighing process and a

reasonable juror could only interpret the instruction as requiring an evidential certainty consistent with the degree of proof required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The South Carolina Supreme Court's interpretation of the trial judge's definition of "reasonable doubt" is in error and the Court should grant the writ of certiorari to resolve the conflict among the jurisdictions.

II.

The South Carolina Supreme Court failed to analyze the reasonable doubt instruction according to the Chapman v. California, 386 U.S. 18 (1967), harmless error analysis.

In Cage v. Louisiana, supra, the Court remanded to the state court for further proceedings. In State v. Cage, 583 So.2d 1125 (La.), cert. denied, ___ U.S. ___, 112 S.Ct. 211 (1991), the Supreme Court of Louisiana found that the jury instruction on reasonable doubt was subject to the harmless error analysis and that such instruction was harmless in that case. Such analysis "mandate[d] consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." United States v. Hasting, 461 U.S. 499, 508 at n. 7 (1983). See Rose v. Clark, 478 U.S. 577 (1986). Here, the verdict of guilt reached in Manning's case is correct beyond a reasonable doubt from the direct and

circumstantial evidence presented in the entire Record. As such, Manning was not entitled to automatic reversal of his otherwise valid conviction without application of a harmless error analysis.

CONCLUSION

For the reasons stated herein, Petitioner urges the Court to grant the Writ of Certiorari.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State . . . . . Respondent,

v.

Warren Douglas Manning . . . . Appellant.

Appeal from Dillon County
C. Anthony Harris, Judge

Opinion No. 23470
Heard June 11, 1991 - Filed
September 9, 1991

REVERSED AND REMANDED

Chief Attorney David I. Bruck, Assistant Appellate Defender Daniel T. Stacey, both of the South Carolina Office of Appellate Defense, of Columbia; Public Defender A. Lafon Legette, Jr., of Latta; and Michael Steigner, of Camden, for Appellant.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr. and Norman Mark Rapoport, all of Columbia; Solicitor C. Gordon McBride, of Hartsville, and Solicitor James C. Anders, of Columbia, for Respondent.

APPENDIX A

GREGORY, C.J.: Appellant was convicted and sentenced to death for the murder of State Trooper George Radford. We reverse and remand for a new trial.

The State presented the following evidence at trial. At approximately 10:40 p.m. on October 29, 1988, Trooper Radford stopped appellant on Highway 34 in Dillon County for a defective headlight. Appellant pulled his car into the McInnis family's driveway. After writing appellant a warning ticket, Trooper Radford was advised by his dispatcher that appellant was driving under suspension. Appellant asked Mr. McInnis if he could leave his car. He then drove off with Trooper Radford in the patrol car. The dispatcher's recording tape indicates the information regarding appellant's driver's license was relayed at 10:44 p.m. followed by other communications. The last word from Trooper Radford to his dispatcher was. "help." It was recorded at 11:12 p.m.

Evidence indicates appellant picked up his car from the McInnises' driveway at around midnight that night.

Trooper Radford's patrol car was spotted early the next morning half-submerged in Reedy Creek Pond, about six and one-half miles from the McInnis residence. He had been shot twice through the head with his own revolver and severely pistol-whipped. The State's forensic expert testified the victim had been shot and beaten while sitting in the driver's seat of his patrol car. The trooper's summons book was found at the scene. The last summons written was to appellant for a defective headlight.

A search was conducted at appellant's residence. Trooper Radford's revolver was found in a tobacco barn about seventy-five yards behind the house. It was hanging in a corner of the barn suspended by vines growing through a hole in the wall. No blood or fingerprints linking appellant to the crime

were found. Ashes taken from a heater in the home indicated some clothing had been burned and a .25 caliber pistol identified as appellant's was found. Evidence indicated appellant had his pistol with him on the night he was stopped by Trooper Radford.

The State's theory of the case was that appellant used his .25 caliber pistol to threaten Trooper Radford after he decided to take appellant in for driving under suspension. The Solicitor argued appellant forced the trooper to drive to Reedy Creek Pond where appellant murdered him and attempted to submerge the patrol car. Appellant testified on his own behalf that after he and Trooper Radford left in the patrol car from the McInnis residence, the trooper stopped another car traveling in front of them after a bag was thrown from its window. There were four people in the car. Trooper Radford approached the vehicle and while he was talking with the driver, appellant fled

from the patrol car unobserved. He went to a friend's house and was driven back to his car.[3]

The sole issue we address is appellant's due process challenge to the trial judge's charge on reasonable doubt. We find the charge, taken in its entirety, constitutionally insufficient.

After the close of evidence at the guilt phase of trial, the trial judge gave the following charge on reasonable doubt:

> Beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and that is a doubt for which you can give a real reason. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason. So it's to that degree of proof that the State is

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[3] Contrary to this testimony, appellant gave a statement to police indicating Trooper Radford let him go after writing the warning ticket.

> required to establish the elements of a charge.

Later in his charge, the trial judge returned to an explanation of reasonable doubt:

> Sometimes during a charge, and I might have used it, the phrase moral certainty might be used. There is no different degree of proof required. Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law. It might be a different way of stating the same proposition. Either of those two phrases, moral certainty, beyond a reasonable doubt, connote[s] a degree of proof which is distinguished from an absolute certainty.

The Due Process Clause of the Fourteenth Amendment "safeguard[s] against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Taylor v. Kentucky, 436 U.S. 487, 98 S.Ct. 1930, 1935, 56 L.Ed.2d 468 (1978). An instruction is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the

Due Process Clause. Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). Such an instruction "could mislead the jury into finding no reasonable doubt when in fact there was some." Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 138, 99 L.Ed. 150 (1954).

Applying these basic principles to the charge given in this case, we first focus on the trial judge's reference to "moral certainty" in defining reasonable doubt. The United States Supreme Court has recently disapproved a standard of moral rather than evidentiary certainty in determining an accused's guilt or innocence. Cage v. Louisiana, 111 S.Ct. at 330. Such a charge is misleading in that it allows a juror to base a finding of guilt upon a subjective feeling rather than upon an evaluation of the evidence. See United States v. Drake, 673 F.2d 15 (1st Cir. 1982). The use of a moral certainty standard rises to the level

of a constitutional violation when it is combined with other terms in the judge's charge which "suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Cage v. Louisiana, 111 S.Ct. at 329-30.

In addition to the moral certainty charge in this case, the trial judge twice defined reasonable doubt as "a doubt for which you can give a real reason." While this definition may not suggest a higher degree of doubt in itself, we must examine it in the context of the charge given as a whole, including the following instruction regarding circumstantial evidence:

> I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such a reasonable explanation can be found you would find the Defendant not guilty....

This charge deviates from the circumstantial evidence cited in State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), that

requires the evidence "point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis." In deviating from the Edwards charge, the charge given in this case turns the State's burden of proof on its head by requiring the jury find a "reasonable explanation" of the evidence inconsistent with appellant's guilt before it can find him not guilty. In conjunction with the further requirement in the charge that a jury must "give a real reason" in order to have a reasonable doubt, we find the charge was a whole suggests a higher degree of doubt than that required for acquittal. Rather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt.

In conclusion, we find the defective aspects of the trial judge's charge on reasonable doubt rendered it so confusing that a reasonable juror could have interpreted the charge as a whole to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. In so holding, we are aware of the difficulty of defining reasonable doubt to a jury. We conclude the term "reasonable doubt" may be best understood when the jury is simply instructed to give it its plain and ordinary meaning. See United States v. Moss, 756 F.2d 329 (4th Cir. 1985). In an abundance of caution, we suggest the trial bench give no further definition than that approved by the United States Supreme Court in Holland:

> A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

REVERSED AND REMANDED.

HARWELL, CHANDLER, FINNEY and TOAL, J.J., concur.

Madam Foreman and members of the jury panel, at this point in the trial of the case it's my responsibility to tell you that what the law is in South Carolina as it relates to the charge made against the Defendant in the indictment by which he's brought to trial.

I take a moment of your time to thank you for your service. Obviously, not just on the jury venire with the others who came in on Monday morning but on your service on this case. I recognize that it's an imposition on you and I thank you for being willing to serve.

You, ladies and gentlemen, are the judges of the facts of this case. As I told you at the commence of the trial, you are the exclusive judges, the only judges, of the facts in the case. The Constitution of this State prohibits me from having any opinion about the facts in a case over which

I preside, so if during the trial of the case when, at times, I've been required to rule on matters, to make statements to the lawyers, various activities during the course of the several days during which we've been together, if during those times you think that I have intimated any opinion about the facts, I tell you to disabuse yourselves of that perception. I have no opinion about the facts in this case and your opinion is absolutely paramount.

In order for you to judge the facts of a case you have to judge the credibility of the evidence. Credibility is a lawyer's word for believability. So you've got to judge the believability of the evidence that's presented here.

Evidence takes two forms. One is the testimony of people who sat there and told you what they know about the case. The other is exhibits. In this case, weapons, bullets, clothes, all that type thing, those

inanimate objects which you will have with you in your juryroom. You will have your recollection of what people said and you will have the actual physical objects with you. You take that testimony and those exhibits, they make up the evidence, and you judge the believability of that evidence. You decide how much it weighs with you in helping you to arrive at your ultimate determination, what really happened on any occasion about which there is a factual dispute.

Madam Foreman, I'm gonna give you some guidelines, some criteria, which you might utilize, if you wish to, in testing the believability of the evidence presented to you. You make take into consideration the interest which any witness might have in the outcome of the case. And if you conclude that any of the witnesses have an interest in the outcome of the case you're entitled to test that witness' believability in the

light of any interest that you might find that he or she had in the case.

You may consider the bias or prejudice which any witness might have, such as relationships to anybody involved in the case. Family, friendship, friendship with the deceased, anything which makes you, in exercising good, sound common sense, think that a particular witness has some reason to lean one way or the other in his or her testimony.

You may consider the demeanor of a witness as he or she sat there and testified. Did they look like they were telling you the truth? How did they respond to the other lawyer's questions? Did they appear nervous? You may believe part of what a witness told you and disbelieve part of what that same witness told you if you have a sound reason for distinguishing between parts of a witness' testimony. You would not simply count up the number of witnesses

who testify in a case and then assign the truth of the dispute to the side having the greater number of witnesses. Quite obviously, that's no way to decide where the truth lies. The law is more interested in the quality of evidence presented than the quantity, so the number of witnesses has no relationship to where the truth might lie.

You may consider the opportunity that any witness might have had to observe and to remember matters about which he or she later come into court and testified.

I tell you you would also apply that criteria and that search to the testimony of any experts, that is people who are allowed to come in and give you their opinions about something. They are, have no higher degree of credibility than a layperson. They are simply allowed to testify from opinion rather than actual observation, so you subject any experts to the same scrutiny as to whether their testimony is credible.

Now, Madam Foreman, members of the jury panel, I'm sure that what you, that you do realize that what I'm really telling you is to use the good, sound common sense that all of you have acquired in your everyday lives and in your business affairs whenever you've been called on in the past to decide who is telling you the truth about any matter that might be in dispute.

As you are the sole judges of the facts, I am the only judge of the law. So that if during the course of the trial, in opening statements or in closing statements, any of the lawyers have told you what they think the law is, if it conflicts in any way with what I tell you the law is, you will forget what they said. Their job is to develop the facts, to prove that certain things occurred or disprove it as the case might be. My job is to tell you what the law is and you would accept from me the principles of law about which I instruct you

and you would apply them to the facts as you find the facts to be. And when yo do that we have each comported with our responsibilities and your verdict, under those circumstances, would be a proper and an authoritative verdict in a case in which a jury and a judge participate together.

Madam Foreman, members of the jury panel, anybody who's charged with committing a crime in this State is presumed to be innocent and the presumption of innocence would obtain in favor of the Defendant throughout the trial. And when you go to your juryroom you will commence deliberating from the viewpoint that the law presumes the Defendant innocent. I'm confident that when you go to the juryroom you will commence your deliberations by giving the Defendant the benefit of the presumption of his innocence, which brings me to the next principle of law and that is that the Solicitor, who represents the people of this State in the

prosecution of alleged crimes, is required to prove to you the existence of every material element of any crime which he charges. In this case the charge is murder, so the solicitor is required to prove beyond a reasonable doubt the existence of each element of the crime of murder. And you, of course, commencing your deliberations from the standpoint that the law presumes the Defendant innocent, would hold the solicitor to the burden of proof. That's what we mean when we use the legal term, burden of proof. Somebody who says something about somebody else is required to prove it to the jury which is empaneled to hear the case.

I tell you, further, that the Solicitor is required, obviously, to prove the existence of the material elements of the charge by evidence presented here in this courtroom since the commencement of this trial.

Madam Foreman and members of the jury panel, murder in this State is the unlawful

killing of another human being with malice aforethought. That is the legal definition of the crime of murder.

In order to convict one of murder the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought. And that proof must, of course, be beyond a reasonable doubt.

When I use the term, beyond a reasonable doubt, in telling you that that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and that is a doubt for which you can give a real reason. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason. So it's to that degree of proof that the State is

required to establish the elements of a charge.

As I told you, in order to convict someone of murder the State has got to prove, not only that the Defendant killed the deceased but that it was done with malice aforethought. Malice is defined in the law as a term of art, that is it's a technical term which imports wickedness. It excludes just cause or excuse. Malice is something which springs from wickedness, from depravity, from a depraved spirit, from a heart which is devoid of social duty and fatally bent on mischief.

I told you that malice might be either express or implied. When I tell you that I do not mean to suggest that there are two kinds of malice, but that there are two ways in which it might be shown.

Malice may be express, as where someone utters threats toward someone else or where someone lies in wait for someone else to

come by so that an assault might be made upon them, or under any other circumstances where malice is actually expressed by the attacker.

Malice may also be implied as where, though no express intention to kill was proved by the evidence, it is indirectly and necessarily inferred from the facts and circumstances which are proven.

I tell you that malice may be inferred from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse.

I tell you, further, that malice may be inferred by the use of a deadly weapon in the infliction of the injury causing the death.

I tell you, members of the jury panel, that if you, as the judges of the facts, conclude that the facts warrant you inferring malice from the two situations which I just described, you will simply use that

inference as an additional piece of evidence in your deliberations which helps you make your independent determination as to whether malice existed in the heart and mind of the Defendant at the time of the infliction of the fatal injuries.

You recall that I told you that in the initial definition that there must be malice aforethought. The law does not require that malice shall have existed for any particular length of time prior to the commission of the act but it must be aforethought, that is, it must exist for at least some time prior to the commission of the act in question. There must be a combination of a previous evil intent and the act which commits the fatal result or which produces the fatal result.

I tell you, Madam Foreman and members of the jury panel, the State is not required to prove any motive for the killing.

Madam Foreman, members of the jury panel, the Constitution of South Carolina and of the United States, affords every Defendant or everyone charged with the commission of a crime, or a substantial suspect in the commission of a crime, with the right not to be a witness against himself. From that amendment, legal principles have been devolved which require that law enforcement officers advise a suspect of his right not to testify and of his right to have a lawyer. Before you could consider any statement made by the Defendant to the law enforcement officers, you would be required, or I'll require you to make a determination, a factual determination as to whether law enforcement officers properly apprised the Defendant of his rights under the Fifth Amendment. After that, before a statement from the Defendant would be admissible in evidence and considerable by you, it must appear that the Defendant waived, in

this case that word, of course, is w-a-i-v-e-d, which means to give up -- whether he gave up those rights and said, in effect, I want to talk to you. I do not require a lawyer to be present. You must make a determination, first, that he was properly advised of his rights under the Fifth Amendment and, secondly, that he freely and voluntarily gave up those rights and agreed to talk to the police, that is with reference to the Statement which the SLED agent quoted the Defendant has having made. It is only to statements given to law enforcement agents that any Constitutional prohibition exists. Statements made to civilians, friends, et cetera, about which some testimony was produced in the trial, are not governed by any Constitutional principles or prohibitions.

Thereafter, I tell you that before you could consider any statement made to law enforcement officers by the Defendant you

must find that such statement was freely and voluntarily given, that is that he was not threatened or coerced so as to override his will, and that he was not promised anything wonderful if he would tell the officers what he knew about it. So when I say freely and voluntarily, I'm talking about circumstances in which any activity on the part of the law enforcement officers which would tend to override a person's free will, were not involved in the taking of that statement.

If you find the absence of the proper instructions by the law enforcement officers or that the Defendant did not give up those rights or that his statement was not freely and voluntarily given, you would not consider what he told those police officers. Simply ignore that and proceed with the remainder of the evidence presented.

Members of the jury panel, the Defendant pleads alibi in this matter. That is, he says that I was not even present at the

scene of the crime, therefore it could not have been me which committed it. I tell you that the Defendant is not assigned any burden of proof to establish his alibi. The burden remains on the solicitor to prove the crime and that the crime was committed by the Defendant so that the fact that the Defendant pleads, I was not there, does not give him the burden of proving that he was not there, it simply means that that's his explanation to you and that from start to finish the solicitor is required to prove beyond a reasonable doubt that the Defendant committed the crime with which he's charged.

Madam Foreman, members of the jury panel, crime may be proved by circumstantial evidence as well as by direct evidence, provided it meets the legal test. By direct evidence of a fact we mean testimony of people who have perceived the existence of that fact by means of their own senses and then come into court and relay to a jury

that I perceive that fact through my senses. The prototype of direct evidence is the eyewitness, that is someone who watches something happen and then tells the jury, this is what I saw. Other senses are hearing, feeling, smelling, et cetera. Those are senses of the human body, human being, with which we're all familiar. Anything perceived through those senses is direct evidence.

By indirect or circumstantial evidence we mean the proof of some other fact or facts from which, when taken even singularly or collectively, the existence of the particular fact in question is necessarily inferred as a consequence of the facts which have been proven.

As I tell you, circumstantial evidence is good provided it meets the legal test. To the extent that the State relies on circumstantial evidence to prove any aspect of its case, the State must prove all the

circumstances relied on and must prove them beyond a reasonable doubt, the definition of which I've already given you.

Those circumstances must be wholly and in every particular consistent with each other and they must point conclusively to the guilt of the accused to the exclusion of any other reasonable hypothesis.

That is, they must be absolutely inconsistent with any reasonable hypothesis other than the guilt of the accused.

When you are giving your attention to circumstantial evidence, I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such reasonable explanation can be found you would find the Defendant not guilty on the charge inasmuch as the Solicitor has relied on circumstantial evidence.

I tell you, further, that the mere fact that the circumstances are suspicious and

the Defendant's guilt probable, would not be sufficient to sustain the conviction because the proof offered by the State must exclude any reasonable hypothesis except that of guilt and must satisfy you beyond a reasonable doubt.

Sometimes during a charge, and I might have used it, the phrase moral certainty might be used. There is no different degree of proof required. Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law. It might be a different way of stating the same proposition. Either of those two phrases, moral certainty, beyond a reasonable doubt, connote a degree of proof which is distinguished from an absolute certainty.

Madam Foreman, members of the jury panel, your verdict in this case would be one of two, guilty or not guilty. Either of those verdicts must be unanimous, all twelve

of you must agree to either of those two verdicts.

You will remember, of course, my instruction to you at the commencement of this portion of the trial. They would be adhered to during your deliberations. That is, you will not consider any possible punishment. You will not allow your deliberations on this stage of the proceeding, did the Defendant commit the crime charged. You will not allow any mental reservations or participation or thoughts about punishment to come into play while you decide, under the facts presented and the law which I've instructed you, is the Defendant guilty or not guilty.

Madam Foreman, members of the jury panel, when you serve as jurors in the Courts of this State, you are not here to reward any friends, you're certainly not here to punish any enemies. You would not render verdicts in our courts based on any sympathy that you might feel for anybody

involved in the unfortunate circumstances which we deal with in our criminal courts. You would render no verdicts based on sympathy toward anybody who might be involved here. Your only obligation, under the oath you took to serve as a juror is to do what is right between the partes (sic) to this lawsuit. So when you go to your juryroom, you make an honest, conscientious effort to resolve the factual dispute, as I'm confident you will do. Decide what really happened on the occasions about which you've heard conflicting stories. Apply the law as I've explained it to you to those facts and you will do what is right between these parties, I'm confident you will do so.

Madam Foreman, I'm going to ask you and your other regular jurors to retire to your jury room. Do not begin deliberating until I send you word to do so. And when you get that word from me, begin your deliberations within the purview of these instructions.

When you've arrived at a verdict I'm going to ask you to simply write it on this sheet of yellow paper, guilty or not guilty. That verdict must be unanimous. If you will simply write it right here, sign your name as foreman. When you have arrived at that verdict, if you'll knock on your juryroom door we will be waiting to receive your verdict.

You two gentlemen, as alternates, I'd simply ask you to retain your seats right there when the jury goes out.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF SOUTH CAROLINA,

Petitioner,

versus

WARREN DOUGLAS MANNING,

Respondent.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina in the above-captioned case by depositing same in the U.S. Mail, first-class, postage prepaid, and properly addressed to the Clerk of this Court.

This 8th day of January, 1992.

Donald J. Zelenka

SWORN to before me this
8th day of January, 1992.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 02/10/92

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF SOUTH CAROLINA,

Petitioner,

versus

WARREN DOUGLAS MANNING,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina on the Respondent by depositing three copies of the same in the U.S. Mail, first class, postage prepaid, and addressed to David I. Bruck, Assistant Appellate Defender, South Carolina Office of Appellate Defense, Post Office Box 12249, Columbia, South Carolina 29211. He further certifies that all parties required to be served have been served.

This 8th day of January, 1992.

Donald J. Zelenka

SWORN to before me this
8th day of January, 1992.

Notary Public for South Carolina (L.S.)
My Commission Expires: 02/10/92

ORIGINAL

Supreme Court, U.S.
FILED
FEB 7 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 91-1148

STATE OF SOUTH CAROLINA,

Petitioner,

v.

WARREN DOUGLAS MANNING,

Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of South Carolina

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE QUESTIONS PRESENTED

1.

Does the South Carolina Supreme Court's assessment of the cumulative effect of defective instructions on reasonable doubt and circumstantial evidence in this case merit review by this Court?

2.

Does the federal constitution require a state supreme court to recite that it has conducted a harmless error analysis before it may reverse a capital murder conviction based on the cumulative effect of a series of erroneous instructions concerning reasonable doubt and circumstantial evidence?

TABLE OF CONTENTS

Page

RESPONDENT'S STATEMENT OF THE QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF FACTS 1

WHY CERTIORARI SHOULD BE DENIED 4

1. Constitutionality of reasonable doubt and circumstantial evidence instructions 4

2. Harmless error 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases:

Arizona v. Fulminate, ___ U.S. ___, 111 S.Ct. 1246 (1991) . . . 8

Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190 (1990) . 5, 6

Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990) . . passim

Chapman v. California, 386 U.S. 18 (1967) 8

Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441 (1990) . . 3

Cupp v. Naughten, 414 U.S. 141 (1973) 6

Gaskins v. McKellar, ___ U.S. ___, 111 S.Ct. 2277 (1991) . . . 6

In re Winship, 397 U.S. 358 (1970) 7

Jackson v. Virginia, 443 U.S. 307 (1979) 7

Pettine v. Territory of New Mexico, 201 F. 489 (8th Cir. 1912) 2

State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989) . . . 3, 4

State v. Manning, ___ S.C. ___, 409 S.E.2d 372 (1991) . . passim

Constitutional Provisions and Rules:

U.S. Const., amend. XIV 6

Sup. Ct. R. 10 5

RESPONDENT'S STATEMENT OF FACTS

The respondent Warren Manning was convicted of the murder of a South Carolina state trooper. The state's case was entirely circumstantial, and centered on evidence that the trooper disappeared shortly after stopping respondent for a traffic violation, and on the state's claim that the trooper's pistol was later found near respondent's home. Pet. for Cert. at 36-37; State v. Manning, ___ S.C. ___, 409 S.E.2d 372, 373 (1991). Respondent testified in his own defense, and told the jury that he had fled after the trooper had stopped another vehicle, and that he had no involvement in the trooper's murder. Id. In addition, one of respondent's witnesses testified that she had seen what appeared to be the trooper's weapon in the possession of the police before it was supposedly "found" near respondent's home. Tr. 719-720.

In weighing the state's case and respondent's defense, the trial jury was guided throughout its deliberations by the following instructions on reasonable doubt:

> When I use the term, beyond a reasonable doubt, in telling you that, that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and that is a doubt for which you can give a real reason. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth, can give a real reason. So, it's to that degree of proof that the State is required to establish the elements of a charge.

Pet. for Cert. at 54-55, Tr. 1080 (emphasis supplied). Returning to the subject of the reasonable doubt standard during his

subsequent charge on circumstantial evidence, the court told the jury:

> Sometimes during the charge, and I might have used it, the phrase moral certainty might be used. There is no different degree of proof required. Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law. It might be a different way of stating the same proposition. Either of those two phrases, moral certainty, beyond a reasonable doubt, connote a degree of proof which is distinguished from an absolute certainty.

Pet for Cert. at 64; Tr. 1086-87.

On appeal, respondent pointed out that the trial judge's use of the term "substantial" as a modifier for "doubt," combined with his repeated assertion that the beyond a reasonable doubt standard was equivalent to "moral certainty," constituted two of the three defects identified by this Court in the charge found unconstitutional in Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990) (per curiam). Respondent also stressed that the charge given here contained an additional mischaracterization of the reasonable doubt standard not found in Cage. This was the trial judge's statement that a reasonable doubt was "a doubt for which you can give a real reason and a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason." Pet. for Cert. at 54; Tr. 1080. As respondent pointed out, State v. Manning, supra, Brief of Appellant at 52-53, these instructions improperly suggested that even if the State's proof had simply not persuaded the juror, his resulting doubt could not be regarded as "reasonable" unless he was also able to articulate a reason for it, Pettine v. Territory of New Mexico, 201 F. 489 (8th Cir. 1912), and even that he must be prepared to justify an acquittal to the court

by stating his reason for doubting the defendant's guilt. Respondent further noted that the prejudicial effect of this latter instruction was heightened by the solicitor's statement in his jury argument to the effect that a reasonable doubt is "just that, a doubt for which you, as a honest juror seeking the truth, can give a reason to; a reasonable doubt is doubt for which you can give a reason. Just that simple." Tr. 1044. See Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 1451 (1990) (prejudicial effect of erroneous instruction may be increased by prosecutorial emphasis).

In reversing respondent's conviction, the South Carolina Supreme Court noted that this Court had recently disapproved both the "substantial doubt" and "moral certainty" instructions in Cage v. Louisiana. State v. Manning, supra, 409 S.E.2d at 374. In addition, the state supreme court identified a separate defect in the circumstantial evidence instructions. Its discussion of this additional error was as follows:

> In addition to the moral certainty charge in this case, the trial judge twice defined reasonable doubt as "a doubt for which you can give a real reason." While this definition may not suggest a higher degree of doubt in itself, we must examine it in the context of the charge given as a whole, including the following instruction regarding circumstantial evidence:
>
> > I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such a reasonable explanation can be found you would find the Defendant not guilty. . . .
>
> This charge deviates from the circumstantial evidence charge cited in State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), that requires that the evidence "point conclusively to the guilt of the accused to the exclusion of every other hypothesis." In deviating from the Edwards charge, the charge given in this case turns

> the State's burden of proof on its head by requiring the jury to find a "reasonable explanation" of the evidence inconsistent with the defendant's guilt before it can find him not guilty. In conjunction with the further requirement in the charge that a jury must "give a real reason" in order to have a reasonable doubt, we find the charge as a whole suggests a higher degree of doubt than that required for acquittal. Rather than conveying to the jury the principle that the State must affirmatively establish appellant's guilt by probative evidence beyond a reasonable doubt, this charge could mislead a reasonable juror to focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt.

Pet. for Cert. at 42-43; 409 S.E.2d at 374-375. The state supreme court summarized its holding as being that "the defective aspects of the trial judge's charge on reasonable doubt rendered it so confusing that a reasonable juror could have interpreted the charge as a whole to allow a finding of guilt below that required by the Due Process Clause." 409 S.E.2d at 375.

WHY CERTIORARI SHOULD BE DENIED

1. Constitutionality of reasonable doubt instructions

The petition for writ of certiorari characterizes this case as presenting the question of whether the "substantial doubt" and "moral certainty" portions of the charge in this case violated the due process principles of Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990). In so characterizing the case, petitioner has omitted entirely from its discussion of the South Carolina Supreme Court's decision the trial judge's unusual circumstantial evidence instruction which required the jury "to find a 'reasonable explanation' of the evidence inconsistent with the defendant's guilt before it [could] find him not guilty." By ignoring this

portion of the state court's opinion, the petition has obscured the fact-bound nature of this case. The decision below presents no question of broader significance than whether due process is denied by a conviction resting on all of the instructions identified as defective by the state court--including the requirement that the jury explain away the state's circumstantial evidence in order to acquit. Counsel for petitioner has pointed to no other case in any other state or federal jurisdiction involving the same configuration of instructional error, and this case therefore appears to present no important or unsettled issue of federal law worthy of review by certiorari. See Sup.Ct.R. 10.

Should the Court nevertheless wish to undertake a detailed examination of the South Carolina Supreme Court's assessment of the reasonable doubt and circumstantial evidence instructions, respondent submits that it will find the state court's conclusions to have been correct. The South Carolina Supreme Court recognized here, as did this Court in Cage, that the cumulative effect of a series of erroneous or problematic instructions can impermissibly diminish the practical force of the reasonable doubt standard itself. The recent decisions from other jurisdictions which petitioner cites, Pet. for Cert. at 24-27, 29-31, all involve instructions substantially different from those given in this case, and the fact that other appellate courts have declined to find other sorts of reasonable doubt instructions to constitute reversible error neither casts into doubt the correctness of South Carolina's assessment of the particular instructions involved here,

nor establishes any sort of "conflict" requiring resolution by this Court.[1]

Petitioner argues that the state court was unduly rigorous in its review of the reasonable doubt instructions, and invokes this Court's admonition in Boyde against "parsing instructions for subtle shades of meaning." Pet. for Cert. at 12, quoting Boyde v. California, ___ U.S. ___, 110 S.Ct. 1190, 1198 (1990). But there is an obvious reason, apparently overlooked by petitioner, why instructions concerning the reasonable doubt standard require the careful scrutiny which this Court applied in Cage. This is that the "shades of meaning" in any instruction on reasonable doubt are central to the reasonable doubt principle itself. After all, the rule of reasonable doubt consists of nothing more than a particular degree of certainty, and even a slight lessening of that degree of certainty vitiates the constitutional right which the reasonable doubt standard embodies. To insist that jury instructions convey exactly this degree of certainty and nothing less, as the Court did in Cage, is not "technical hairsplitting," Boyde, supra, but "an essential of the due process guaranteed by the Fourteenth Amend-

[1]The same must be said of the reasonable doubt instructions referred to in the statement of Justice Stevens, concurring in the denial of certiorari in Gaskins v. McKellar, ___ U.S. ___, 111 S.Ct. 2277 (1991). Despite petitioner's characterization of the Gaskins reasonable doubt instructions as "similar" to those involved here, Pet. for Cert. at 23, the instructions in Gaskins did not include the burden-shifting circumstantial evidence charge which the South Carolina Supreme Court found so prejudicial in this case. Gaskins is thus inapposite, and even had this Court's denial of certiorari in Gaskins constituted an "opinion" of the Court, as petitioner seems to assume, Pet. for Cert. at i, Question II, it would not call into question the validity of the South Carolina Supreme Court's judgment in this case.

ment," Jackson v. Virginia, supra, 443 U.S. 307, 316 (1979), the denial of which "by itself so infect[s] the entire trial that the resulting conviction violate[s] due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973).

Against this backdrop, the reasonable doubt instructions given here plainly suffered from the defects identified by the South Carolina Supreme Court. The trial judge's repeated reminders that a reasonable doubt must be a "substantial" doubt for which the jurors could give a "real reason," that proof beyond a reasonable doubt amounted to no more than "moral certainty," and that the jurors must search for and find a reasonable explanation of the state's circumstantial evidence in order to acquit the accused, all combined to weaken and dilute the reasonable doubt standard, and to impermissibly lighten the state's burden of proof. Under In re Winship, 397 U.S. 358 (1970), and Cage v. Louisiana, supra, the state court was obligated to grant the relief it did, and there exists no reason to re-examine the state court's judgment.

2. Harmless error

Nor is any substantial federal question presented by respondent's complaint that the South Carolina Supreme Court should have articulated a harmless-error analysis before reversing. Given the circumstantial nature of the state's case, the prejudicial effect of the instructional errors was obvious. Respondent is aware of no provision of the federal constitution which requires a state supreme court to discuss in a published opinion the extent to which a criminal defendant was harmed by being deprived of the benefit of

the reasonable doubt standard, at least where, as here, the harm is evident from even a brief summary of the evidence presented at trial. See Pet. for Cert. at 36-39, State v. Manning, supra, 409 S.E.2d at 373. Unlike Arizona v. Fulminate, ___ U.S. ___, 111 S.Ct. 1246 (1991), this case does not involve a determination by a state court that any particular category of federal constitutional error can never be harmless, but only an implicit determination that the violation in this case was not harmless. Under these circumstances, the decision of the state supreme court to reverse respondent's conviction without spelling out its harmless-error analysis under Chapman v. California, 386 U.S. 18 (1967), presents no federal question for review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 7, 1992

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF SOUTH CAROLINA,

Petitioner,

v.

WARREN DOUGLAS MANNING,

Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this 7th day of February, 1992, one copy of the brief in opposition to the petition for writ of certiorari, together with one copy of the Motion for Leave to Proceed in Forma Pauperis were mailed, postage prepaid, to the below named counsel for Petitioner. I further certify that all parties required to be served have been so served.

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SUBSCRIBED AND SWORN TO before me
this 7th day of February, 1992.

Lesley M. Coggiola (L.S.)
Notary Public for South Carolina
My Commission Expires: March 12, 1997